

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-7007

United States Court of Appeals

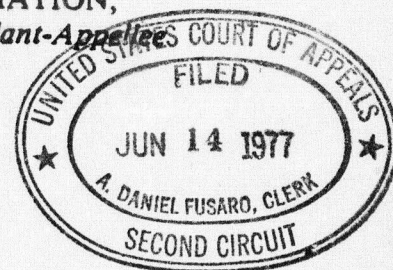
For the Second Circuit

HARTFORD NATIONAL BANK & TRUST COMPANY,
Plaintiff-Appellant

against

WESTCHESTER FEDERAL SAVINGS & LOAN ASSOCIATION,
Defendant-Appellee

On Appeal from the United States District Court
for the Southern District of New York



PLAINTIFF-APPELLANT'S
PETITION FOR REHEARING EN BANC

William M. Ivler, Esq.
Attorney for Plaintiff-Appellant
300 Broad Street
Stamford, Connecticut 06901
(203) 324-3111

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POINT I

UPON REHEARING, THIS COURT'S
JUDGMENT SHOULD BE MODIFIED BY
ELIMINATING THAT PORTION REMANDING
THE MATTER FOR FURTHER PROCEEDINGS

This Court, in reversing the judgment below, remanded the action for further proceedings to determine

... what contractual obligations were owed by Hyde Park to its tenants at the time the account was created; ... what tenants, if any, made rent security deposits with Hyde Park, ... which of the deposits had been repaid by Hyde Park...

... if Hyde Park has in one way or another paid to the tenants the amounts of their rental deposits ...

It is respectfully submitted that this Court, upon the oral argument of this Appeal, heard and considered statements as to "tenants' claims after trial" made by Westchester's counsel and totally unsupported by any evidence or testimony appearing in the Record, and used such statements as a basis for remanding this action for further proceedings.

The matter remanded for further hearing could not have come before this Court based upon the Record herein, but only by considering these post-trial unsupported statements of counsel.

Westchester had, prior to the argument, and in the nine months from trial in January, 1976 to decision in October, 1976, and from the time of the decision to the argument of the Appeal in

April, 1977, failed to move, either under Rules 59 or 60(b) of the Federal Rules of Civil Procedure to either obtain a new trial or to relieve defendant on the grounds of "newly discovered evidence".

However, on April 29, 1977, Westchester's counsel, in addition to adverting to new matter in Westchester's Reply Brief, referred to these alleged post-trial demands.

As stated in Garcia v. American Marine Corporation, 432 F (2d) 6 (C.A. 5, 1970) at page 8:

Counsel for appellant attempts to rectify his manifest failure to controvert the facts at the proper time by affixing to his brief a supplemental and amending affidavit ... It is fundamental that facts not presented at trial may not be asserted on appeal. Any action on appeal can be properly based only on matters considered on trial; ... (underlining added)

(Cf. Creamette Company v. Merlino, 289 F (2d) 569 (C.A. 9, 1961))

As this Court stated in its reversal (page 3915 of its Opinion):

The rent deposits did not flow in and out of the savings account. A deposit in one lump sum was made in April 1971 and, except for interest credits, no deposits or withdrawals were made between then and July of 1974.

There is not one hint of a fact adduced or evidence submitted in the Record to support a surmise or assumption, no less a conclusion, that these monies on deposit had anything whatsoever to do with "tenants" or "tenants' security deposits under leases".

It is submitted that defendant Westchester had had ample time from the institution of this action to trial (if not until the argument of the Appeal herein) to obtain and submit any evidence to support its allegation of "trust moneys" as contained in paragraph 11 of its Answer (Appendix 11-a) or that there was a "contractual obligation ... owed by Hyde Park to its tenants at the time the account was created" or, "what tenants, if any, made rent security deposits with Hyde Park" or, "if Hyde Park has in one way or another paid to the tenants the amounts of their rental deposits".

There is nothing in the Record to even form a basis for a conclusion that any tenants even existed when the bank account was opened in 1971 (or 5 weeks later when the account was pledged to plaintiff Hartford) or that any tenant did, in fact, thereafter even make a payment of a security deposit to anyone.

The fact that there was only one lump sum deposit which remained untouched by either further deposits or withdrawals must bring the obvious and only conclusion that this pledged account could never have served as the depository of security deposits of rents of individual tenants, but was solely for the Westchester's purposes as a mortgagee.

Defendant Westchester had had the opportunity either on the Motion for Summary Judgment or on trial to submit proof of any

kind to support its contentions that the pledged account was, as designated in its internal records, a "Rent Security Account". However, not one shred of direct or indirect evidence was submitted, nor alluded to at any time.

If Westchester's counsel's statements upon the oral argument are not considered, it is readily seen that plaintiff Hartford proved its right to the pledged account and defendant failed to submit any proof to overcome such right.

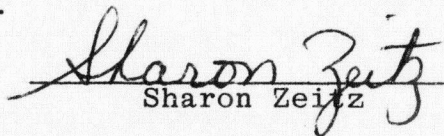
It is submitted that such bare statements should not be the basis for remanding for further proceedings.

Respectfully submitted,

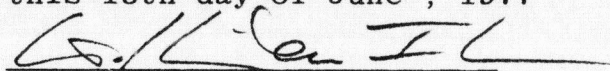
WILLIAM M. IVLER, ESQ.
Attorney for Plaintiff-Appellant
300 Broad Street, Suite 700
Stamford, Connecticut 06901
(203) 324-3111

STATE OF CONNECTICUT
COUNTY OF FAIRFIELD ss:

Sharon Zeitz, being duly sworn, deposes and says that on June 13, 1977 she mailed two copies of Plaintiff-Appellant's Petition for Rehearing En Banc to Victor Pacor, Esq., the attorney for Defendant-Appellee, at 56 Harrison Street, New Rochelle, New York.


Sharon Zeitz

Sworn to before me
this 13th day of June , 1977



William M. Ivler
Commissioner of the Superior
Court, Fairfield County